Filed 3/20/19 In re E.O. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.O. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.M., Defendant and Appellant.	E071636 (Super.Ct.Nos. J268250 & J268251) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed in part, reversed in part with directions.

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, K.M. (father), of E.O. and K.M. (minors), appeals the juvenile court's order terminating his parental rights under Welfare and Institutions Code section 366.26.[1] Father argues that plaintiff and respondent, San Bernardino County Children and Family Services (CFS), failed to investigate minors' Native American ancestry pursuant to the Indian Child Welfare Act (ICWA) (25. U.S.C. § 1091 et seq.) and provide adequate ICWA notice.[2] Father seeks reversal of the juvenile court's order terminating his parental rights with an instruction that the juvenile court order CFS to conduct further investigation into minors' Native American ancestry.

CFS concedes error and argues that a conditional reversal of the order terminating parental rights is warranted because it will allow CFS to document its ICWA inquiry and cure any ICWA notice requirements. CFS also asks that we instruct the juvenile court to reinstate the order terminating parental rights if no tribe intervenes.

We agree that the record shows an incomplete ICWA investigation into the minors' Native American ancestry and deficient ICWA notices. Therefore, we conditionally reverse and remand the case for the limited purpose of compliance with ICWA.

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[1] Unless otherwise stated, all statutory references are to the Welfare and Institutions Code.

[2] D.O. (mother) is not a party to this appeal.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2016, CFS detained the minors, K.M., born in March 2015, and E.O., born in April 2016, due to parental neglect. The minors' parents abused drugs, engaged in domestic violence, had significant mental health issues, and were not taking their prescribed medications. The minors lacked food, basic care and housing, and father was incarcerated due to violating parole. The minors were placed with nonrelative extended family members. A few days before, on November 10, 2016, mother's friend, who was caring for the minors, picked them up at 1:00 a.m. and found they were soaked in urine and feces and shaking from the cold.

On November 16, 2016, on behalf of the minors, CFS filed petitions pursuant to section 300, subdivision (b), failure to protect, and subdivision (g), father provided no provisions for support because he was incarcerated.

At the detention hearing on November 17, 2016, the juvenile court found a prima facie showing under section 300, subdivisions (b)(1) and (g). Father completed an ICWA-20 form (Parental Notification of Indian Status) and advised the court that he had no Native American ancestry. Mother also completed an ICWA-20 form, but reported that she may have "unknown" Native American ancestry on her maternal grandmother's side. However, mother did not identify any tribe.

On December 6, 2016, the social worker reported that ICWA may apply. Prior to that date, the social worker met with J.I., the maternal great-grandmother (MGGM), and maternal uncle at mother's home in San Bernardino. A paternal great-aunt also contacted CFS stating that she was interested in the minors' placement in her home.

At the December 8, 2016, jurisdictional/dispositional hearing, the juvenile court sustained the section 300 petitions. Mother asked to have MGGM, who was present in court, be assessed as a potential placement for the minors. At the time, MGGM was not questioned about the maternal family's Native American ancestry. The juvenile court continued the ICWA inquiry and set a January 26, 2017, hearing date. The January 2017 hearing was continued to February 23, 2017, to allow CFS to complete ICWA noticing.

On February 21, 2017, CFS filed an ICWA declaration of due diligence, stating ICWA-030 notices with return receipts requested regarding the minors' Native American status had been served on the Secretary of the Interior, the Bureau of Indian Affairs (BIA), the ICWA Family Safety Program, the Cherokee Nation of Oklahoma, the United Keetoowah Band of Cherokee Indians, and the Eastern Band of Cherokee Indians.[3] The ICWA notices identified Cherokee ancestry on father's side, but no Native American ancestry on mother's side. The ICWA notices also listed maternal and paternal family names, some with incomplete names, birth dates and places of birth.

[3] The record is unclear about what information CFS obtained regarding the minors' potential relationship to these three Indian tribes.

At the February 23, 2017, hearing, the juvenile court found ICWA noticing had been initiated and that ICWA may apply. Father was deemed minors' presumed father and minors were declared dependents of the court. The court also ordered that minors remain with nonrelated extended family members and that family reunification services be provided for parents.

On April 25, 2017, CFS filed proposed ICWA findings along with a final ICWA declaration of due diligence, that stated two Cherokee Bands had responded that the minors were not tribal members and did not qualify for membership. CFS asked the juvenile court to issue an order finding ICWA notices had been given to the Department of Interior, BIA, and the three tribes, for a period of at least 65 days but with no response. The court granted CFS's request and found ICWA did not apply. Neither parent appealed the order.

Prior to the August 15, 2017, review hearing, CFS submitted a status review report that stated ICWA did not apply. The report recommended that the juvenile court terminate reunification services for the parents and set a section 366.26 hearing to terminate parental rights. CFS asserted father failed to comply with the reunification services offered, and a warrant for father's arrest was issued because father did not comply with his parole conditions. The status report also stated mother failed to submit to drug testing, tested positive on one occasion, and was unable to demonstrate behavioral changes to protect the minors. The six-month review hearing was continued to September 2017.

On September 27, 2017, the juvenile court terminated father's reunification services, but ordered additional reunification services for mother. Thereafter, at the review hearing on December 4, 2017, the juvenile court ordered additional family reunification services for mother and supervised visits with the minors if mother tested clean. The court also set a section 366.22 12-month review hearing for May 14, 2018.

On May 3, 2018, CFS filed a status review report that stated ICWA did not apply. The status report also noted that the minors' nonrelative extended family member caregivers were willing to adopt the minors.

At the review hearing on May 14, 2018, the juvenile court noted that it was in receipt of two ICWA inquiry forms from MGGM[4] and maternal uncle. The information about the family's Native American ancestry in MGGM's ICWA form was left blank. Maternal uncle's ICWA form checked the Native American ancestry "unknown" box. However, both family members provided their phone numbers and stated they could be reached at "any time." The 12-month review hearing was continued to June 2018.

On June 12, 2018, at the 12-month review hearing, the juvenile court admitted into evidence the ICWA inquiry forms submitted by MGGM and maternal uncle at the prior hearing. The court ordered mother's reunification services terminated because mother had failed to make substantive progress in her treatment plan. The court also set a section

[4] Status review reports filed by CFS on November 29, 2017, and on May 3, 2018, indicated CFS had contact with MGGM.

366.26 hearing for October 2018. No writs were filed related to the section 366.26 hearing.

At the October 10, 2018, hearing, the juvenile court set the section 366.26 hearing for November 9, 2018. However, after full advisement, mother relinquished her parental rights and asked to be excused from the November 9, 2018, hearing because she agreed with CFS's adoption recommendation.

On November 9, 2018, the juvenile court found it was likely the minors would be adopted by their caregivers and terminated parental rights. Father timely filed a notice of appeal from the order terminating his parental rights.

III.

DISCUSSION

After CFS submitted the final ICWA declaration of due diligence, the juvenile court found the 65-day period had passed and concluded that ICWA did not apply. Father contends CFS's investigation into minors' family history and Native American ancestry was incomplete, resulting in deficient ICWA notices. CFS concedes this point also. For reasons explained, we also agree.

ICWA was enacted to "'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.'" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 173-174.) The juvenile court has an affirmative and continuing duty to inquire and provide meaningful notice to any relevant tribe when it has reason to know that a Native American child is involved in a dependency proceeding. (§ 224.2,

subd. (a).) That duty is independent of any obligation on the part of the parents of the dependent child. The court and the agency must act upon information received from any source, not just the parent. Therefore, the parent's failure to object in the juvenile court to deficiencies in the ICWA investigation or noticing does not preclude the parent from raising the issue for the first time on appeal from an order terminating parental rights. (*In re K.R.*, (2018) 20 Cal.App.5th 701, 706; *In re Isaiah W.* (2016) 1 Cal.5th 1, 10-11.)

ICWA "'recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.'" (*Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 52.) "The minimum standards established by ICWA include the requirement of notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.'" (*In re Isaiah W., supra*, 1 Cal.5th at p. 8.) If the identity of the tribe cannot be determined, the notice shall be given to the Secretary of Interior and BIA. (*Id*. at pp. 8-9.) The notice requirements are strictly construed because a tribe's right to intervene is meaningless if the tribe is unaware of the proceeding. (*In re Karla C., supra,* 113 Cal.App.4th at p. 174.)

The purpose of ICWA notice is to enable the tribe or BIA to investigate. (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995.) Therefore, notice should include all available information about the child's parents, maternal and paternal grandparents and great-grandparents, especially those with alleged Indian heritage, including maiden, married and former names and aliases, birthdates, places of birth and death, current and

former addresses, and information about tribal affiliation including tribal enrollment numbers. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

Family members do not have the burden of providing the agency with information to determine whether the minor is an Indian child. (*In re Michael V.* (2016) 3 Cal. App.5th 225, 233.) Rather, the agency has the duty to obtain all possible information about the minor's ancestry and Native American background and provide germane information to the relevant tribe or, if the tribe is unknown, to the BIA. (*In re C.D.* (2003) 110 Cal.App.4th 214, 226.) Since the agency has a continuing duty to investigate and obtain the family history (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989), the social worker, as soon as practicable, should interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to provide information concerning the child's membership status or eligibility. (*In re Michael V., supra,* at p. 233; Cal. Rules of Court, rule 5.481(a)(4)(A).)

After the agency gives the required ICWA notice, the juvenile court must determine whether proper notice was appropriately given and whether ICWA applies to the proceedings. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1530, citing *In re Asia L.* (2003) 107 Cal.App.4th 498, 506.) "Substantial compliance with the notice requirements of ICWA is sufficient. [Citation.]" (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566; accord, *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 237.) Nevertheless, information in the ICWA notice sent to the BIA and Indian tribes must contain enough information to be meaningful. (*In re Karla C., supra,* 113 Cal.App.4th at p. 175.)

Accordingly, substantial compliance requires that the notice include sufficient information—at least to the extent that it is both available and otherwise required by law—to give the tribe "a meaningful opportunity to evaluate whether the dependent minor is an Indian child within the meaning of the ICWA. [Citation.]" (*In re Louis S.* (2004) 117 Cal.App.4th 622, 629; accord, *In re Karla C.*, *supra*, at p. 178.)

We review the court's findings that ICWA notices were properly given and ICWA does not apply for substantial evidence. (*In re Christian P.* (2012) 208 Cal.App.4th 437, 451.)

At the detention hearing in November 2016, mother claimed "unknown" Native American ancestry on her maternal grandmother's side. This information required the social worker to interview minors' parents and extended family members about information that would be relevant to providing ICWA notice to the Secretary of Interior, BIA and relevant tribes. While the record does not explain the source of the information, the social worker apparently learned that there might be Cherokee ancestry, resulting in notices being sent to the various Cherokee tribes.

However, the ICWA notices sent contained scant information about the family's relatives' addresses and aliases, to allow a meaningful ICWA inquiry by the tribes or the BIA. The ICWA notices identify father's Cherokee ancestry, not mother's Native American ancestry. In addition, the maternal grandmother's name, J.S., and aliases are listed with her birth date, but no current or former addresses are listed. The maternal

grandfather's name is listed with a birth date, but no current or former addresses are listed.

MGGM's name is listed with a current address, place and date of birth, but there are no former addresses and no alias names listed. The maternal great-grandfather's name is listed but no other information was identified. Another maternal grandmother, A.H., is listed without any aliases, no place of birth, and only a partial current address but no former addresses.

Although the ICWA notices state the potential Native American ancestry is on the minors' father's side, the notices do not have current or former addresses for the paternal grandparents and the paternal grandmother's alias names are not listed. In addition, the paternal great-grandmother, C., who is listed in the ICWA notices as possibly affiliated with Cherokee tribes, has no other identifying information.

CFS could have initially questioned MGGM about the family's history when MGGM was present at the jurisdictional hearing on December 8, 2016. On December 23, 2016, the social worker met with MGGM and maternal uncle, and the social worker had another opportunity to obtain family history information approximately two weeks later. We agree with father's contention that CFS failed to reasonably investigate the family's Native American history and provide relevant information to the Department of Interior, BIA and the tribes in the ICWA notices.

At the status review hearing on May 14, 2018, MGGM requested an ICWA inquiry, as did maternal uncle. Although the information that both relatives provided in the ICWA inquiry form was limited, we cannot assume that these family members did not have relevant family history information to provide to CFS simply because the forms were incomplete. These family members may have had insufficient time to complete the forms in court before they submitted them at the May 2018 hearing. Moreover, the ICWA forms had both family members' phone numbers, and both MGGM and maternal uncle stated that they could be reached at "any time." Thus, the juvenile court's finding that ICWA did not apply in April 2018, did not excuse the agency from its continuing duty to conduct a reasonable ICWA inquiry. (§ 224.3, subd. (c); Cal. Rules of Court, rule 5.481(a)(4).)

Here, three family members stated the minors may have Native American ancestry triggering CFS's duty to conduct a reasonable ICWA inquiry. In addition, early in the case, the social worker was contacted by a maternal aunt who lived in Illinois. Therefore, the social worker had at least four contact sources to obtain relevant family history information that could have provided more complete ICWA notices to the Secretary of Interior, BIA, and relevant tribes. Moreover, both mother and father had mental health issues which required them to take prescription medication, and it was not the parents' burden to establish the minors' Native American ancestry because they "may be unsure or unknowledgeable of their own status as a member of a tribe." (*In re B.H.* (2015) 241 Cal.App.4th 603, 607.) Rather, the social worker has a duty to investigate the names and

dates of biological grandparents and great-grandparents for direct lineal ancestry in order to substantially comply with the notice requirements of the ICWA. (See §§ 224.2, subd. (a)(e)(1), 224.3, subd. (a)(1), (a)(3)(A), (a)(5)(C).)

Because the ICWA notices were deficient, the order terminating parental rights must be conditionally reversed and remanded for further proceedings in accordance with the ICWA. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 212, fn. 6; *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1429.) On remand, the agency must investigate further by interviewing additional relatives, including the paternal great-aunt, T.G., who contacted CFS. T.G. may have information relevant to the agency's duty to further investigate the minors' Native American ancestry.

IV.

DISPOSITION

The juvenile court's order terminating parental rights is conditionally reversed. The cause is remanded with directions to conduct such further proceedings as are necessary to establish full compliance with the ICWA notice requirements. If, after receiving notice as required by the ICWA, no response is received from the Department of Interior, BIA and the Cherokee tribes indicating minors are Indian children, or if the responses received indicate minors are not Indian children within the meaning of the act, the order terminating parental rights shall be reinstated and such further proceedings as are appropriate shall be conducted. If any tribe determines that minors are Indian

children within the meaning of the act, the dependency court shall proceed accordingly. In all other respects, the orders are affirmed.

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CODRINGTON
Acting P. J.

We concur:

FIELDS
J.

RAPHAEL
J.